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No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1995

J. GEILS BAND EMPLOYEE BENEFIT PLAN, JOHN GEILS, JR., STEPHEN BLADD, RICHARD SALWITZ, AND SETH JUSTMAN,

PETITIONERS,

v.

SMITH BARNEY SHEARSON, MATTHEW McHUGH, AND KATHLEEN HEGENBART,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal common law doctrine suspending statutes of limitations in cases of fraudulent concealment requires the plaintiff to exercise due diligence in discovering his claim.

LIST OF PARTIES

The undersigned counsel of record certifies that the following persons and entities have an interest in the outcome of this case.

A. J. Geils Band Employee Benefit Plan
B. John Geils, Jr.
C. Stephen Bladd
D. Richard Salwitz
E. Seth Justman
F. Smith Barney Shearson
G. Matthew McHugh
H. Kathleen Hegenbart

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PETITION FOR A WRIT OF CERTIORARI

The J. Geils Band Employee Benefit Plan, John Geils, Jr., Stephen Bladd, Richard Salwitz, and Seth Justman respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The petitioners initiated arbitration proceedings before the National Association of Securities Dealers on May 28, 1993, and then filed suit in the United States District Court for the District of Massachusetts on October 7, 1994 for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). The respondents moved for summary judgment on the ground that the petitioners'

claims were barred by the applicable statute of limitations, 29 U.S.C. § 1113. The District Court (Keeton, J.) granted the motion in an unreported opinion reproduced in the appendix hereto, A-32, and thereafter entered a final judgment of dismissal.

The United States Court of Appeals for the First Circuit affirmed the judgment of the District Court in a published decision made and entered on February 20, 1996, *J. Geils Employee Benefit Plan* v. *Smith Barney Shearson, Inc.*, 76 F.3d 1245 (1st Cir. 1996) (Torruella, J.), which is reproduced in the appendix hereto. A-1. The Court of Appeals denied a petition for rehearing of that ruling by an unpublished order made and entered on March 21, 1996, which is also reproduced in the appendix hereto. A-29.

JURISDICTION

The petition seeks review of a decision of the United States Court of Appeals for the First Circuit made and entered on February 20, 1996, as to which a timely petition for rehearing was denied in a ruling made and entered on March 21, 1996. A-29. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The petition is timely pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.3.

STATUTE INVOLVED IN THE CASE

Title 29, § 1113 of the United States Code provides that:

No action may be commenced under this [ERISA] subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

STATEMENT OF THE CASE

A. *Factual Background*

In 1985, petitioner Stephen Bladd ("Bladd"), the trustee of petitioner J. Geils Band Employee Benefit Plan ("Plan"), entrusted to respondent Smith Barney Shearson ("Shearson") approximately $900,000 in cash and securities. Bladd had no prior investment experience other than serving as trustee for the Plan during its previous one-year stint with another brokerage company. The account executive for the Plan at Shearson was respondent Kathleen Hegenbart ("Hegenbart"). The branch manager at Shearson charged with supervising the Plan's accounts was respondent Matthew McHugh ("McHugh"). Bladd was not only the trustee of the Plan but also a participant, as were petitioners John Geils, Jr., Richard Salwitz, and Seth Justman ("Justman"). The participants were former members of a rock music band that had recently broken up and had not performed since 1983.

Bladd and the other participants emphasized to Hegenbart that they had little knowledge of financial management or investments. They explained that, because the band was no longer performing, they did not expect to receive the income they had enjoyed in the past, and that their overriding priorities were safety and preservation of capital. In response, Hegenbart assured the petitioners that she understood their objectives and that the Plan's funds would be invested safely. Thereafter, the Plan followed all of Hegenbart's recommendations with little or no deviation. The Court of Appeals properly assumed that Hegenbart acted as an ERISA fiduciary. A-6 n.3, 76 F.3d at 1250 n.3.

Taking advantage of the petitioners' lack of investment sophistication, Hegenbart and Shearson undertook a fraudulent course of churning, inappropriate investment, and excessive commissions. First Hegenbart indiscriminately sold all of the Plan's preexisting investments and replaced them with others. In 1985 and 1987, Hegenbart caused the Plan to invest in three highly risky limited partnership real estate ventures packaged by Shearson and managed by a wholly-owned subsidiary of Shearson's parent company, American Express. Hegenbart represented to Bladd that the partnership interests were low-risk investments consistent with the Plan's objectives of safety and capital preservation. Indeed, the very names of the limited partnerships, such as "Balcor Pension Investments VI" and "Federal Insured Mortgage Investors II," suggested such suitability. Hegenbart further indicated that if the Plan held the limited partnership interests for six years, they would produce a return of principal, plus 12% income per year.

Hegenbart then proceeded to take steps to conceal the nature and performance of the limited partnerships, making misrepresentations upon which Bladd relied. Until May 1990, Hegenbart sent Bladd misleading quarterly reports on the Plan's investments that characterized the real estate limited partnerships as a lower risk "blue chip corporate" investment having an actual value equal to their purchase price and enjoying the expected annual return of 12%.[1] Hegenbart also sent to Bladd monthly statements, which were much more difficult to read, containing a fine print legend stating that the limited partnership values listed did not necessarily reflect current value, but these statements did not negate the other reports' characterizations of safety and return. Hegenbart, moreover, falsely stated to Bladd on several occasions that the limited partnerships were safe and worth what the Plan had paid for them.[2] The respondents did not contest these facts in their motion for summary judgment.

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[1] Court of Appeals Appendix ("App.") vol. I at 42-46, 50-51, 229-33.

[2] App. vol. II at 372.

Hegenbart fraudulently churned the Plan's investment in long-term, zero-coupon bonds ("CATS"). In June 1985, Hegenbart purchased for the Plan a CATS having a value at maturity of $3.1 million. In May, 1986, Hegenbart recommended that the Plan sell that CATS and purchase what she described as a more desirable replacement. Hegenbart stated that these transactions would yield a profit of $195,000, plus a higher value at maturity ($3.6 million). Hegenbart did not disclose that the transaction would yield $93,000 in commissions for Shearson. In fact, the transa tion resulted not in a profit but a loss for the Plan of $313,000, because, as Hegenbart also did not disclose, the 1986 CATS had both a longer term and a lower yield than the CATS it replaced. Bladd, the Plan's trustee, did not learn of these losses until his counsel consulted with experts in 1994.

Shearson's excessive commissions were fraudulent in themselves. Hegenbart had represented to Bladd that Shearson's commissions would be at or below the market rate, which for the CATS transactions would have been in the range of 0.5% to 2%. In fact, the commission on the purchase of the CATS in 1985 was 3.5%, the commission on the sale of the same CATS in 1986 was 3.5%, and the commission on the CATS purchased in 1986 was a whopping 6%. A-3, 76 F.3d at 1248. Hegenbart never disclosed this information to Bladd or the Plan. Shearson actually never disclosed its commissions as a separate line item while serving the Plan. In February 1993, the Plan requested in writing the disclosure of the commissions it had paid to Shearson. Shearson did not comply with this request until almost one year later in January 1994.

In October 1990, petitioner Justman commenced arbitration proceedings against Shearson and Hegenbart in connection with personal losses, not losses of the Plan. In the arbitration proceedings, Justman's counsel received documents revealing that the commissions Shearson had taken from the Plan in the first thirteen months of its handling of the account alone amounted to $110,000, or approximately ten percent of the Plan's total assets. Bladd first learned this information

following the conclusion of Justman's arbitration proceeding in the summer of 1992, and shortly thereafter engaged counsel to investigate.

B. *Proceedings Below*

On May 28, 1993, the petitioners commenced arbitration proceedings before the National Association of Securities Dealers ("NASD"). The NASD ruled that the petitioners' claims were ineligible for arbitration because the trades in question had occurred more than six years before the commencement of the proceedings.

On October 7, 1994, before the NASD decision had become final, the petitioners filed suit in the United States District Court for the District of Massachusetts, alleging that the respondents had breached their fiduciary duties to the Plan, a common plan and trust within the meaning of ERISA, 29 U.S.C. §§ 1001 *et seq*. The District Court had jurisdiction pursuant to 29 U.S.C. § 1132 and 28 U.S.C. § 1331. It granted the respondents' motion for summary judgment on all claims, believing them barred by the pertinent ERISA statute of limitations, 29 U.S.C. § 1113.

The petitioners appealed to the Court of Appeals for the First Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291. That court affirmed. It reasoned that § 1113, which provides for a six-year statute of limitations in cases of fraud or concealment, incorporates the federal discovery rule tolling statutes of limitations. A-13, 76 F.3d at 1253. The Court of Appeals determined, however, that, since in its view the petitioners could have discovered the fraud more than six years prior to suit through the exercise of due diligence, it "need not make any specific findings regarding the issue of whether [the respondents] . . . concealed the alleged fraud." A-18, 76 F.3d at 1256. In so ruling, the First Circuit acknowledged its deviation from the law of the Seventh Circuit, which, under the doctrine of "equitable estoppel," does *not* require a plaintiff to demonstrate due diligence when the defendant asserting

the statute of limitations has engaged in affirmative acts of concealment. A-14 n.10, A-24, 76 F.3d at 1254 n.10, 1259, *citing Martin* v. *Consultants & Administrators, Inc.*, 966 F.2d 1078, 1096, nn.19-20, 1098 (7th Cir. 1992).

REASONS FOR GRANTING THE WRIT

I. There Is a Split Among the Circuits on an Important Question of Federal Law.

A. *The First Circuit Erroneously Rejected the Doctrine of Equitable Estoppel.*

This case presents an important question concerning the equitable suspension of federal statutes of limitations, not only for claims under ERISA but also all other federal claims. The circuits are in general agreement with the First Circuit that the ERISA statute of limitations for claims against fiduciaries, 29 U.S.C. § 1113, incorporates the federal common law rules equitably adjusting the running of statutes of limitations. *See, e.g.*, *Larson* v. *Northrop Corp.*, 21 F.3d 1164, 1172-73 (D.C. Cir. 1994); *Farrell* v. *Automobile Club*, 870 F.2d 1129, 1131 (6th Cir. 1989); *Martin* v. *Consultants & Administrators, Inc.*, 966 F.2d 1078, 1093 (7th Cir. 1992); *Schaefer* v. *Arkansas Medical Soc'y*, 853 F.2d 1487, 1491 (8th Cir. 1988); *see also Barker* v. *American Mobil Power Corp.*, 64 F.3d 1397, 1402 (9th Cir. 1995). The circuits, however, expressly disagree as to what those doctrines actually provide.

The First Circuit erroneously upheld dismissal of the petitioners' claim by imposing upon the petitioners a requirement of due diligence in learning of their claim notwithstanding the respondents' efforts to conceal their fraud after having perpetrated it. In so ruling, the First Circuit declined to recognize the doctrine of equitable estoppel, which suspends the running of the statute of limitations during a defendant's subsequent fraudulent concealment of his original wrongful act, irrespective of any lack of diligence by the plaintiff. Had the Court of

Appeals instead applied the correct rule of law, the petitioners' claims would not have been dismissed on summary judgment, since there were genuine disputes of fact as to whether the respondents had sought to conceal their wrongdoing until the spring of 1990, less than six years before the petitioners brought suit. The decision conflicts with several decisions of the United States Court of Appeals for the Seventh Circuit. *See, e.g., Wolin* v. *Smith Barney, Inc.*, 1996 WL 234341 at * 4 (7th Cir. May 8, 1996) (Posner, C.J.) (expressly recognizing disagreement with First Circuit); *see also J. Geils Band Employee Benefit Plan* v. *Smith Barney Shearson, Inc.*, A-14 n.10, A-24, 76 F.3d 1245, 1254 n.10, 1259 (1st Cir. 1996) (acknowledging deviation from earlier Seventh Circuit precedent).

The First Circuit erred by considering only the "discovery rule," which is implied into all federal statutes of limitations. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946). Under that rule, "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Holmberg*, 327 U.S. at 397. The discovery rule thus governs when a statute of limitations "accrues," that is, when it begins to run.

The federal common law, however, also comprehends the doctrine of equitable estoppel, which focusses not upon the plaintiff (for example, his diligence or capacity for discovery), but upon the conduct of the defendant. It suspends the running of the statute of limitations when the defendant has engaged in misconduct designed to conceal his prior wrong. In essence, the doctrine of equitable estoppel ensures that "no man may take advantage of his own wrong." *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959) (extending statute of limitations where defendant fraudulently told plaintiff he had seven years in which to sue); *Martin*

v. *Consultants & Administrators, Inc.*, 966 F.2d 1078, 1103 (7th Cir. 1992) (Posner, J., concurring) ("there is no reason why such persons should benefit from compounding their frauds, as they would if their efforts at concealment, to the extent successful, shortened the period of limitations").

The First Circuit held the petitioners' fraud claims untimely because it believed that, with the exercise of due diligence, the petitioners would have succeeded in uncovering the frauds shortly after they occurred. The plaintiff's obligation of due diligence, however, properly pertains to the discovery rule, not to the suspension of a statute of limitations by equitable estoppel. By imposing an unconditional obligation of due diligence on the plaintiff, the First Circuit has effectively eliminated the doctrine of equitable estoppel as it pertains to federal statutes of limitations. Under its ruling in this case, due diligence will be required of a plaintiff seeking extension of a statute of limitations even though the defendant has affirmatively sought to conceal his wrongful actions, thus permitting the defendant to gain an advantage through misconduct.

Chief Judge Posner has recently set out the doctrines of discovery and equitable estoppel in a case under the same statute at issue here, 29 U.S.C. § 1113, and has noted the First Circuit's error in this case. "Equitable estoppel . . . is invoked when the prospective defendant [makes] a special effort to cover up the fraud" after it has occurred. *Wolin*, 1996 WL 234341 at ** 4-5 (7th Cir. May 8, 1996). Its focus is the defendant's misconduct. The defendant is estopped to plead the statute of limitations, at least for the relevant period of time. *See* C. Corman, 2 *Limitations of Actions*, § 9.1 at 37-39 (1991 & 1993 supp.); C. Wright and A. Miller, 4 *Federal Practice and Procedure*, § 1056 (2d ed. 1987 & 1996 supp.) ("A fourth avenue [of extending statutes of limitations] is equitable estoppel, hinging on defendants' representations that prevent plaintiffs from suing before the statute of limitations has run; defendants are then estopped from pleading a statute of limitations defense"); A. Levy, *Solving Statute of Limitations*

Problems, §§ 4.39 and 4.40 (1987 & 1992 supp.) (citing state law cases).

The discovery rule, in contrast, provides that "the statute of limitations does not even begin to run until the prospective plaintiff learns or *should learn* that he has been injured." *Wolin*, 1994 WL 234341 at * 4 (emphasis added). As Chief Judge Posner correctly observed:

> After the statute of limitations starts running it still may be arrested. This is the domain of equitable tolling and equitable estoppel. They differ critically in scope in the following respect: when the plea is equitable tolling rather than equitable estoppel, the defendant is innocent of the delay (though not of course of the original wrong), so the plaintiff must use due diligence to be allowed to toll the statute of limitations; if he does not, he has no equitable claim to avoid the time bar. In the case of equitable estoppel, which requires active misconduct by the defendant, the plaintiff is not required to be diligent. At least that is the rule in this [the seventh] circuit. Some of the other circuits disagree. *See, e.g., J. Geils Band Employee Benefit Plan* v. *Smith Barney Shearson, Inc.*, [76 F.3d 1245, 1258 (1st Cir. 1996)]; *Golden Budha Corp.* v. *Canadian Land Co.*, 931 F.2d 196, 201 (2d Cir. 1991) [New York law].

Wolin, 1994 WL 234341 at * 4.

B. *This Court Should Rectify the Confusion of Doctrines Applicable to All Federal Statutes of Limitations.*

The First Circuit's decision in this case misstates the federal law governing equitable application of statutes of limitation and exacerbates a division of authority among the circuits, calling for review by this Court. *See* Supreme Court Rule 10(a). Indeed, this Court does not appear to have addressed

the elements of fraudulent concealment since its decision in *Bailey* v. *Glover*, 88 U.S. 342 (1875). In that case, the Court stated that "where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute [of limitations] will not bar relief provided suit is brought within proper time after the discovery of the fraud." *Bailey*, 88 U.S. at 347-48. *Bailey* went on to hold that in the alternative circumstance "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special efforts on the part of the party committing the fraud to conceal it from the other party." 88 U.S. at 348 (citations omitted); *see also Exploration Co.* v. *United States*, 247 U.S. 435 (1918) (discovery rule applied to "self-concealing fraud" in action to rescind fraudulently procured land patent); *United States* v. *Diamond Coal & Coke Co.*, 255 U.S. 323 (1921) (same).

Despite the plain suggestion in *Bailey* that due diligence is not required when the defendant affirmatively undertakes to conceal his fraud after it has occurred, the lower federal courts have failed to speak with one voice for several decades. *See* R. Marcus, Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?, 71 *Geo. L. J.* 829, 833, 913-14 (1983) (predicting continued "haphazard" results until this Court reviews a fraudulent concealment case). Although some differing statements of tolling doctrine create distinctions that are "apparent rather than real," *Wolin*, 1996 WL 234341 at * 4, there is a persistent difference of opinion regarding the need for due diligence in the face of active concealment. The Seventh Circuit consistently has held that when "the fraud goes undiscovered because the defendant has taken positive steps after the commission of the fraud to keep it concealed . . . [the] fraudulent concealment tolls the limitation period until actual discovery by the plaintiff." *Tomera* v. *Galt*, 511 F.2d 504, 510 (7th Cir. 1975); *see also*, *e.g.*, *Sperry* v. *Barggren*, 523 F.2d 708, 711 (7th Cir. 1975); *Martin*, 966

F.2d at 1096 n.19. The Second Circuit has agreed. *Robertson* v. *Seidman & Seidman*, 609 F.2d 583, 593 (2d Cir. 1979); *accord Dodds* v. *Cigna Securities, Inc.*, 12 F.3d 346, 352 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1401 (1994).[4] But over a decade ago, the District of Columbia Circuit noted the split in authority concerning whether diligence is required in such cases of active concealment. *Hobson* v. *Wilson*, 737 F2d 1, 34 n.103 (D.C. Cir. 1984) (contrasting Second and Seventh Circuits to Sixth Circuit), *cert. denied sub nom. Brennan* v. *Hobson*, 470 U.S. 1084 (1985); *see also, e.g., State of Ohio* v. *Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694-95 (10th Cir.) (rejecting *Robertson), cert. denied*, 454 U.S. 895 (1981); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980). Like the First Circuit, the District of Columbia Circuit has adopted the erroneous view that a plaintiff seeking to toll § 1113 must demonstrate due diligence. *Larson* v. *Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994); *Foltz* v. *U.S. News & World Report, Inc.*, 663 F.Supp. 1494, 1537 (D.D.C. 1987), *aff'd*, 865 F.2d 364 (D.C. Cir.), *cert. denied*, 490 U.S. 1108 (1989). The Eighth Circuit suffers from the same misconception. *Schaefer* v. *Arkansas Medical Soc'y*, 853 F.2d 1487, 1491-92 (8th Cir. 1988). Confusion will continue without the intervention of this Court.

The instant case presents not only divided lower courts but also an important issue of federal law that should be resolved by this Court. *See* Supreme Court Rule 10(c). Although the petitioners' claim was dismissed pursuant to the statute of limitations for claims against ERISA fiduciaries, itself an

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[4] The equitable estoppel doctrine does not apply to the three-year statute of *repose* now applicable to claims under § 10(b) of the Securities Act of 1934. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 360 (1991) (adopting one-year/three-year rule). The lower courts disagree as to whether equitable estoppel, without a requirement of due diligence, applies to the one-year statute of *limitations* for the same claims. *Contrast Tregenza* v. *Great American Communications Co.*, 12 F.3d 717, 720-21 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1837 (1994), *with Falik* v. *Parker Duryee Rosoff & Haft*, 869 F.Supp. 228, 232-33 (S.D.N.Y. 1994).

increasingly active area of litigation, the issue is a larger one of federal law. This Court has frequently observed that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,'" *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (quoting *Hallstrom* v. *Tillamook Co.*, 493 U.S. 20, 27 (1989)), but it has not laid out the contours of such tolling. As the Seventh Circuit has recently noted, the doctrines of tolling and accrual are "often misunderstood" and "rarely the subject of sustained scholarly attention." *Wolin*, 1996 WL 234341 at * 1. Review by this Court would remedy the disarray of the lower federal courts regarding legal doctrines affecting virtually every federal civil claim.

II. The First Circuit's Opinion Will Encourgage Fraudulent Concealment by Eliminating Its Penalty.

The First Circuit's decision in this case is no mere technical error in a subject matter marked by confusion. It will have very practical, and deleterious, consequences. It now matters not whether the perpetrator of a fraud continues to decieve his victim, for example by making false statements designed to obscure the wrong, so long as at one moment enough information was available that a diligent victim (not one who believed the defendant) could have pieced together the fraud. In other words, transmission of a lengthy technical document that the victim is unlikely to read (for it is precisely the unsophisticated investor who is less likely to be "diligent") immunizes any further acts of deception. Further falsehoods after the fraud, under the First Circuit's rule, will incur no penalty. That cannot and should not be the law. *See Martin*, 966 F.2d at 1103 (Posner, J., concurring); Note, Developments in the Law — Statutes of Limitations, 63 *Harv. L. Rev.* 1177, 1220 (1950) ("the most justifiable of the exceptions to the running of limitations are based upon the acts of the defendant which have impeded suit").

To be sure, a statute of limitations advances important interests, such as repose, and may not effectively be eliminated through promiscuous application of equitable doctrines. *See, e.g., United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (even in complex cases involving unsophisticated plaintiffs, statutes of limitations begin to run when the plaintiff knows of his injury). Enforcement of such statutes, however, involves a balancing of the relevant equities. A defendant who not only commits a fraud but thereafter actively endeavors to obscure and perpetuate his wrong or to induce the victim to refrain from bringing suit has no legitimate interest in repose.

In this connection, it would be possible to conceive of the ongoing, active efforts to conceal the initial fraud as a new fraud itself giving rise to a state law cause of action for deprivation of the earlier federal claim. Note, Developments in the Law — Statutes of Limitations, 63 *Harv. L. Rev.* 1177, 1220 & n.353 (1950). In such an independent fraud action, the petitioners would bear no burden of proving "due diligence." Under pertinent Massachusetts law, "[t]he recipient of a fraudulent misrepresentation of fact is justified in relying on its truth, even though he might have ascertained the falsity of the representation had he made an investigation." *Zimmerman* v. *Kent*, 31 Mass. App. Ct. 72, 81, 575 N.E.2d 70, 76 (1991); *Yorke* v. *Taylor*, 332 Mass. 368, 374, 124 N.E.2d 912, 914 (1955) (plaintiff's diligence not required). No purpose would be served by requiring the petitioners to file in state court a confusing lawsuit containing within it yet another lawsuit.

III. The First Circuit's Unconditional Requirement of Due Diligence Contravenes the Text and Spirit of ERISA.

The decision of the Court of Appeals in this case is contrary to not only the doctrines of common law, but also the text and goals of ERISA. Congress has mandated that ERISA be construed to protect pension beneficiaries and ensure the

highest standards of fiduciary conduct. *See* 29 U.S.C. §§ 1001(a) and (b); *Varity Corp.* v. *Howe*, 116 S.Ct. 1065, 1070 (1996). These ends are not served by reading into the statute a requirement that a plaintiff heed "storm warnings" and exercise "reasonable diligence" where, as here, there have been affirmative acts of fraudulent concealment by the ERISA fiduciary. Congress can hardly have intended to nullify the doctrine of equitable estoppel in this area and thereby subject an ERISA plan to greater barriers to recovery than those presented to any other plaintiff. It likewise cannot have intended to encourage ERISA fiduciaries to conceal their breaches of duty after the fact by eliminating any penalty for such concealment.

The text of the pertinent ERISA statute of limitations, moreover, contradicts the First Circuit's absolute requirement of due diligence irrespective of the defendant's ongoing misconduct. Section 1113 contains no reference to "reasonable diligence" or to discovery that "should have" been made. Ironically, in support of its interpretation the Court of Appeals suggested that § 1113 is "almost identical to that of Section 13" of the Securities Act of 1933. A-13, 76 F.3d at 1253. Section 13 of the Securities Act, however, provides that "[n]o action shall be maintained . . . unless brought within one year after the discovery of the untrue statement or the omission, or *after such discovery should have been made by the exercise of reasonable diligence*. . . ." 15 U.S.C. § 77m (emphasis added). Hence it is actually the textual difference between the two statutes that sheds light on Congress' intended meaning. When Congress wishes to impose a requirement of due diligence, it knows how to do so. It did not do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 19, 1996

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United States Court of Appeals
For the First Circuit

No. 95-1699

J. GEILS BAND EMPLOYEE BENEFIT PLAN, ET AL.,

PLAINTIFFS - APPELLANTS,

v.

SMITH BARNEY SHEARSON, INC., ET AL.,

DEFENDANTS - APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. ROBERT E. KEETON, *U.S. District Judge*]

Before

TORRUELLA, *Chief Judge*,

BOWNES, *Senior Circuit Judge*,

and STAHL, *Circuit Judge*.

Thomas J. Butters, with whom *Cullen & Butters* was on brief for appellants.

Barry Y. Weiner, with whom Christopher P. Litterio, William E. Ryckman and *Shapiro, Israel & Weiner, P.C.* were on brief for appellees.

February 20, 1996

TORRUELLA, *Chief Judge*. Appellants, the J. Geils Band Employee Benefit Plan (the "Plan"), and Stephen Bladd (the "Trustee"), John Geils, Jr., Richard Salwitz and Seth Justman (the "Participants"), brought this suit alleging fraud and breach of fiduciary duty under the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1994), in connection with certain investment transactions made by Appellees in 1985, 1986 and 1987. The district court granted the motion for summary judgment brought by

Appellees, Smith Barney Shearson ("Shearson"), Matthew McHugh, and Kathleen Hegenbart, on the grounds that Appellants' claims are time barred under ERISA's six-year statute of limitations. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are summarized in the light most favorable to Appellants, the party opposing summary judgment. *Barbour* v. *Dynamics Research Corp.*, 63 F.3d 32, 36 (1st Cir. 1995).

The Plan, also known as T & A Research and Development, Inc., was formed as a pension and profit sharing plan for the employees of the J. Geils Band and, as a common plan and trust, it is subject to ERISA. In April of 1985, Bladd as the Plan's Trustee[1] opened accounts for the Plan with Shearson Lehman Brothers, Inc., a registered broker-dealer and a member firm of both the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE). This appeal stems from Shearson's management between 1985 and 1990 of the Plan's account and, specifically, its purchase of three limited partnerships (the first in June of 1985, the second in September of 1985, and the third in June of 1987) and execution of a "bond swap" in May of 1986.

The Plan's accounts were handled by Hegenbart, a Shearson employee who acted as the Plan's stockbroker from 1985 until Appellants transferred the accounts from Shearson in 1990. McHugh, a Shearson branch manager, supervised the accounts. Hegenbart would make a recommendation, and if Appellants accepted it and executed an order, she would receive a commission. If the recommendation was not accepted, she would not receive any compensation from Appellants. While Appellants communicated to Hegenbart that they knew very little about financial management or investment, Appellants retained decision-making authority over the Plan accounts. At no time was Hegenbart given power of attorney or discretionary authority over the accounts.

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[1] The record shows that prior to serving as the Plan's trustee, Bladd had no significant financial background or experience.

Upon opening the Plan's accounts, Hegenbart sold the securities transferred to it and one month later, in June of 1986, purchased over $500,000 of long-term zero coupon bonds ("CATS"), Shearson-managed mutual funds, and certificates of deposit. In May of 1986, Appellants swapped the CATS purchased in 1985 for other bonds upon Hegenbart's recommendation. The bond swap resulted in an overall loss to the Plan and generated over $90,000 worth of commissions — $32,000 for the bonds purchased in 1985 and $61,000 for their sale in May of 1986, and the subsequent purchase of the new bonds. The Plan was charged commissions of about 3.5% for the sale of the CATS purchased in 1985, 3.5% for the 1986 sale, and approximately 6% for the 1986 purchase of the new CATS.

Between 1985 and 1987, Appellants purchased a total of $165,000 worth of three Shearson-packaged limited partnership interests. The first was purchased in June of 1985, for $100,000. On or about the purchase date, Bladd, as Trustee, and Justman executed a Subscription Agreement under penalty of perjury. According to this agreement, they acknowledged, *inter alia*, that (i) they received the prospectus; (ii) there was not expected to be a public market for their investment; and (iii) there were risks involved, which the prospectus disclosed. Appellants were sent prospectuses which similarly disclosed risks involved when they purchased $40,000 worth of the second limited partnership interest in September of 1985, and when they purchased $25,000 of the third in June of 1987.

Each of the Participants, including Bladd as Trustee, received monthly statements, as did Justman's accountant, Nick Ben Meir ("Ben-Meir"). The monthly statements disclosed the transactions which occurred during the particular month as well as a summary of the Plan's portfolio but did not separately break out the amount of commissions charged. The monthly statements listed the "face amount" of the limited partnerships, but not the market value. As of January 1986 they included the following statement: "The face

amount does not necessarily reflect current market value." Appellants also received quarterly "Portfolio Reviews," which consisted of two documents: (i) a chart setting forth the Plan's portfolio, including the investment, date of purchase, amount invested, current market value, and yield, among other information; and (ii) an investment pyramid showing the relative safety of each investment and its market value, including the total account value. Unlike the monthly statements, the record shows that the portfolio review dated October 1988 lists as the market value what was actually the face amount of the interests in the limited partnerships. In the May 1990 portfolio review, the limited partnerships are listed in the "amount invested" column, with two of them appearing with undefined subtractions for "ROC" which exceed $19,000; the corresponding "market value" column is blank. Bladd, as Trustee, also received letters from McHugh as early as June of 1985 in which he offered both to help him review the Plan's investment objectives and results obtained and to discuss how Shearson could be of greater assistance.

While Ben-Meir did not receive the statements with the purpose of reviewing Hegenbart's investment decisions, the record shows he did review some potential investments as early as May of 1986. In October of 1988, Justman received a letter from Ben-Meir regarding an analysis of Justman's portfolio. In the letter, Ben Meir communicated that he had exchanged "some extremely sharp words" with Hegenbart regarding some of the figures shown in the analysis, particularly with respect to the limited partnership interests. The letter stated that all of them are worth "far below their cost" and "strongly advise[d] [Justman] *not* to enter into any more of these types of investments," because the "'loading' charges (fees and commissions *off the top*), together with their continuingly reduced value for tax purposes . . . make them unattractive . . . ." (Emphasis in original). Ben-Meir then expressed that "[d]espite [Hegenbart's] repeated statements to me that she only has your best interest at heart, my instincts say otherwise, and I would urge you, once again, to request

and obtain an accounting of the fees and commissions earned by Shearson and her as a result of her placing you in all these [l]imited [p]artnerships." Finally, the letter closed with the recommendation that "[i]f you decide to continue using [Hegenbart] to manage your portfolio, that's okay, but you should clearly change the amount of discretion you have been allowing, so that no purchases or sales are made without your complete review of all proposals and direction."

In late July to August 1990, the Plan accounts were transferred from Shearson. Some time thereafter, the Plan's new broker informed Bladd that the limited partnerships were unsuitable for investors desiring safety and were worth less than the amount reflected in the latest review, confirming Ben-Meir's October 1988 observations. Between the summers of 1991 and 1992, internal Shearson "activity reports" produced during arbitration proceedings brought by Justman against Shearson[2] revealed information regarding the excessive commissions, also confirming Ben-Meir's observations. Appellants maintain that they only learned of the Plan's losses resulting from the bond swap in January of 1994, when they were informed by counsel whom they had retained in October of 1992.

Pursuant to an agreement between the parties to arbitrate disputes, Appellants commenced arbitration proceedings with the NASD by filing a Uniform Submissions Agreement dated August 20, 1993, seeking recovery for alleged breaches of fiduciary duty by Appellees. On motion by the Appellees, the NASD Director ruled on May 15, 1994, that virtually all of the claims were ineligible for arbitration under Section 15 of the NASD Code of Arbitration Procedure, because all trades giving rise to the claims occurred more than six years prior to the filing of the arbitration in August of 1993.

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[2] In that proceeding, *Seth Justman* v. *Shearson Lehman Hutton and Kathleen Hegenbart*, NASD No. 90-02937, Justman sought damages as a result of alleged unlawful actions resulting in large losses. The NASD docket reveals that these proceedings were commenced on October 19, 1990 and closed on June 3, 1992.

On October 7, 1994, Appellants filed the civil action below. In their complaint, Appellants allege that Appellees violated their purported fiduciary duty[3] to the Plan under ERISA with respect to the three limited partnership interests and the "bond swap." Appellants contend the following: (1) that these transactions were unsuitable for the Plan and were inconsistent with its investment objectives; (ii) that Hegenbart, in order to obtain higher commissions, made fraudulent statements to induce the Participants, whom she knew were unsophisticated investors relying on her investment advice, into making these transactions; and (iii) that in connection with the bond swap Appellees charged commissions grossly exceeding the rate Hegenbart had represented would be charged. Appellants subsequently filed a motion compelling arbitration of all claims or, in the alternative, staying arbitration pending adjudication by jury trial of non-arbitrable claims. In response, Appellees filed an answer and counterclaim for declaratory judgment, opposition to Appellants' motion, and a motion for summary judgment as to the complaint and counterclaim.

Pending disposition of these motions, Appellants requested review of the decision by the Director of the NASD. On January 10, 1995, the arbitration panel affirmed the Director's decision. On May 9, 1995, the district court entered a memorandum and interlocutory order by which Appellees' summary judgment motion was granted. The district court concluded that Appellants' claims were time-barred under

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[3] Appellees motion for summary judgment also argued that the claims were barred because Appellees were not fiduciaries under ERISA. The district court did not rule on this issue. For purposes of this appeal, we assume, without deciding, that Appellees were under a fiduciary duty. *See Maggio* v. *Gerard Freezer & Ice, Co.*, 824 F.2d 123, 129 (1st Cir. 1987) (finding no need to resolve merit of allegations that uncles and brothers, as fellow shareholders in a close corporation, owed plaintiff a fiduciary duty). For a recent discussion of ERISA and, in particular, whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of duty, see *J. Mertens* v. *Hewitt Associates*, __ U.S. __, 113 S. Ct. 2063 (1993).

ERISA's six-year statute of limitations on the grounds that, under-the fraudulent concealment doctrine as applied in this Circuit, Appellants had been placed on inquiry notice — by their receipt of the prospectuses and monthly statements — more than six years before commencing their cause of action. After voluntary dismissal of Appellees' counterclaims without prejudice, the court entered a final judgment on June 23, 1995. This appeal followed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo* and, like the district court, review the record in the light most favorable to the non-moving party. *See, e.g., Barbour* v. *Dynamics Research Corp.*, 63 F.3d 32, 36-37 (1st Cir. 1995); *Woods* v. *Friction*, 30 F.3d 255, 259 (1st Cir. 1994). Our review is limited to the record as it stood before the district court at the time of its ruling. *Voutour* v. *Vitale*, 761 F.2d 812, 817 (1st Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one which "has the potential to affect the outcome of the suit under the applicable law." *Nereida-Gonzalez* v. *Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993). If the moving party demonstrates that "there is an absence of evidence to support the non-moving party's case," the burden shifts to the non-moving party to establish the existence of a genuine material issue. *FDIC* v. *Municipality of Ponce*, 904 F.2d 740, 742 (1st Cir. 1990) (quoting *Celotex Cor.* v. *Catrett*, 477 U.S. 317, 325 (1986)). Thus, the nonmovant bears the burden of placing at least one material fact into dispute once the moving party offers evidence of the absence of a genuine issue. *Darr* v. *Muratore*, 8 F.3d 854, 859 (1st Cir. 1993); *see also Celotex Corp.*, 477 U.S. at 322 (1986) (stating that Fed. R. Civ. P. 56(c) "man-

dates the entry of summary judgment, ... upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). In other words, neither "conclusory allegations, improbable inferences, and unsupported speculation," *Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir.1990), nor "[b]rash conjecture coupled with earnest hope that something concrete will materialize, is []sufficient to block summary judgment." *Dow* v. *United Bhd. of Carpenters*, 1 F.3d 56, 58 (1st Cir. 1993).

DISCUSSION

Resolution of this appeal requires that we determine whether the ERISA statute of limitations, which is codified at 29 U.S.C. § 1113,[4] applies to bar Appellants' action. Section 1113 requires that Appellants commence their action within six years from the date of the last transaction giving rise to their claim, unless they demonstrate "fraud or concealment," in which case they must commence their action within six years from the date they discover the breach.

The first step requires us to determine "the date when the

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[4] Section 1113 provides as follows:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach of the violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (1994). We note that Section 1113 was amended by Congress both in 1987 and in 1989. Neither of these amendments, however, have any bearing on this appeal.

last action which constituted a part of the breach or violation" occurred — one of a number of temporal determinations to be made. 29 U.S.C. § 1113(1)(A). Here, the purported violations in connection with the limited partnership interests occurred in June of 1985, September of 1985, and June of 1987, and those made in connection with the bond swap occurred in May of 1986.[5]

The second requires us to determine when the cause of action was commenced. The district court assumed, without deciding, that NASD Code § 18(a) tolls the statute of limitations in this case. The district court concluded that August 20, 1993, the date on which Appellants filed the Uniform Submission Agreement with the NASD,[6] should serve as the date marking commencement of the action. The district court reasoned that even by using that date, which was more favorable to the Appellants, the purported violations — in June of 1985, September of 1985, May of 1986 and June of 1987 — nonetheless occurred more than six years earlier. Neither party disputes this reasoning on appeal and, because it has no bearing on the outcome, we adopt without further comment the district court's use of August 20, 1993 as the date the action was commenced.

Because Appellants filed the action below more than six years after the last transaction giving rise to the alleged violations, we turn next to the question of whether the "fraud or

[5] Appellants state in their brief that the last alleged commission overcharges occurred in December 15, 1988. Appellees contend that the last commissions were charged in June 1987. Our review of the record indicates that there was a commission charge on June 24, 1987 for (what appears to be) about $1,200. The only evidence we can find of commission charges in 1988 is a March 2, 1988 entry corresponding to a distribution where the initials "CLP" appear in the "commissions" column. We do not find this alone to be sufficient evidence supporting resolution of this dispute in favor of Appellants.

[6] Section 18(a) of the NASD Code of Arbitration Procedure provides that "where permitted by applicable law, the time limitation which would otherwise run or accrue for the institution of legal proceedings shall be tolled where a duly executed Submission Agreement is filed by Claimants."

concealment" exception applies to toll the limitations period. Appellants argue that it does, and that the district court erred when it held to the contrary. The interpretation of the fraud or concealment clause of Section 1113 is one of first impression for this Circuit. We address the various issues this question raises in turn.

A. *Fraudulent Concealment and the Proper Discovery Standard under Section 1113*

The first issue involves a determination of when the limitations period begins to run in cases of fraud or concealment under Section 1113. Resolution of this question requires us to decide what standard — objective or subjective — is to be applied when determining the "date of discovery." As the district court noted, other circuits have interpreted Section 1113 to incorporate the federal doctrine of "fraudulent concealment," which operates to toll the statute of limitations until the plaintiff in the exercise of reasonable diligence discovered or should have discovered the alleged fraud or concealment. *See Larson* v. *Northrop Corp.*, 21 F.3d 1164, 1172-74 (D.C. Cir. 1994) (Campbell, J., sitting by designation) (holding that Section 1113's fraud or concealment exception incorporates the common law fraudulent concealment doctrine); *Martin* v. *Consultants & Administrators, Inc.*, 966 F.2d 1078, 1093-96 (7th Cir. 1992) (same); *Schaefer* v. *Arkansas Medical Society*, 853 F.2d 1487, 1491-92 (8th Cir. 1988) (same); *see also Bailey* v. *Glover*, 88 U.S. 342, 349 (1875) (discussing fraudulent concealment doctrine).

After noting the approach followed in *Larson* and *Martin*, the district court concluded that, even if we were to hold that Section 1113 could be tolled by showing something less than "fraudulent concealment," Appellants would still not prevail. In reaching its conclusion, the district court reasoned that in light of our interpretation of the fraudulent concealment doctrine as applied to limitation periods contained in the Securities Exchange Act of 1933 and 1934, Appellants will have failed to meet their burden of production alleging facts of

fraud or concealment if Appellees show that Appellants were on inquiry notice of the alleged violations more than six years before the filing date. *See Kennedy* v. *Josephthal & Co.*, 814 F.2d 798, 802-03 (1st Cir. 1987) (holding that plaintiffs are on notice where there are "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved") (quoting *Cook* v. *Avien, Inc.*, 573 F.2d 685, 697 (1st Cir. 1978)). The district court found that Appellants were on "discovery" or "inquiry" notice more than six years prior to August 20, 1993, due to their receipt of the prospectuses and monthly statements Appellees sent them. Thus, it was because the district court found that the documents received by Appellants contained "sufficient storm warnings," which would have alerted them to the possibility of fraud had they acted with reasonable diligence, that it concluded Appellants failed to carry their burden of production regarding the issue of fraud or concealment.

In challenging the decision below, Appellants argue that the district court erred in its construction of Section 1113 when it applied the objective standard under the fraudulent concealment doctrine. Specifically, Appellants contend that because Section 1113 involves breaches of fiduciary duty, the term "discover" used in connection with fraud or concealment should mean that the six year limitation period begins to run only when Appellants, who are unsophisticated investors, subjectively gained knowledge that their fiduciary made material misrepresentations to them. In support of this argument, Appellants point to the plain language of Section 1113 and to the fact that Congress did not include the phrase "knew or should have known." In addition, they maintain that adopting a subjective standard comports with Congress' mandate that ERISA be liberally construed to protect pension beneficiaries and to ensure the highest standards of fiduciary conduct. *See* 29 U.S.C. § 1001(a), (b). In this regard, they contend that the Congressional mandate is not properly served by requiring that participants heed storm warnings and exer-

cise reasonable diligence where affirmative acts of fraud and concealment are alleged. Finally, Appellants insist that if some standard of reasonable diligence is to be applied, then, at a minimum, traditional factors used in assessing reasonable diligence — the existence of a fiduciary relationship, the nature of the fraud, the opportunity to discover the fraud, the subsequent acts of defendants, and the sophistication of the plaintiffs — should be considered before granting summary judgment. *See Maggio*, 824 F.2d at 128; *Cook*, 573 F.2d at 697.

As always, we begin with the relevant statutory language. Section 1113's tolling provision provides that "in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation." 29 U.S.C. § 1113. As the District of Columbia Circuit recently noted, this is the only provision in Section 1113 for delaying the accrual of the limitations period until the date of discovery. *See Larson*, 21 F.3d at 1172. By its very language, then, Section 1113 explicitly incorporates the federal common law "discovery rule," which postpones the beginning of the limitation period from the date when the plaintiff is injured to the date the injury is discovered. *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). As we noted when interpreting the statute of limitations contained in Section 13 of the Securities Act of 1933, which is applicable to Section 12(2) of that Act, "the doctrine of fraudulent concealment is the common law counterpart of the 'discovery' standard prescribed by § 13 to limit actions brought under § 12(2)." *Cook*, 573 F.2d at 695; *see Anixter* v. *Home-Stake Production Co.*, 939 F.2d 1420, 1434 n.18 (10th Cir. 1991) (citing *Cook* for this proposition). We concluded in *Cook* that the running of Section 13 was triggered by the very same considerations used to determine when the cause of action accrues and when the statute is tolled under federal common law. *Cook*, 573 F.2d at 695; *see Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (holding that equitable doctrine of fraudulent concealment is read into

every federal statute of limitations). We find that Section 1113's discovery rule is almost identical to that of Section 13[7] and perceive no reason why we should not follow *Cook's* approach and hold that Section 1113 also incorporates the fraudulent concealment doctrine.[8] Moreover, we have yet to encounter a convincing argument as to why we should part company from those circuits which have already addressed this issue and have concluded that Section 1113 indeed incorporates the fraudulent concealment doctrine. *See Larson*, 21 F.3d at 424-25; *Martin*, 966 F.2d at 1093; *Schaefer*, 853 F.2d at 1491-92; *see also Barker* v. *American Mobil Power Cor.*, 64 F.3d 1397, 1401-02 (9th Cir. 1995) (noting with approval that other circuits have so held).[9]

Next, with respect to the scope of "discovery" in the fraud or concealment exception, we believe that the term encompasses both actual and constructive discovery. As the Seventh

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[7] Section 13 provides in pertinent part:

> No action shall be maintained to enforce any liability created under Section . . . [12(2)]of this title unless brought within one year after the date of discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . .

15 U.S.C. § 77m (1994).

[8] In reaching this decision, we have taken into account the different policies underlying, and protections afforded by, the Securities & Exchange Acts of 1933 and 1934 and ERISA. Absent statutory or other Congressional directive, we find no reason why our interpretation of the statutes of limitations should not be guided by the same approach.

[9] Where courts differ is on how "in the case of fraud or concealment" should be construed, specifically whether it includes both so-called "self-concealing wrongs" as well as "active concealment" that is separate from the underlying wrongdoing. *See generally Martin*, 966 F.2d at 1093-96, 1101-04 (Posner, J., concurring); *Radiology Center*, 919 F.2d at 1220-21; *see also* footnote 16 *infra*. Resolution of this appeal does not require us to make a definitive determination as to which side of this dialogue we adhere. We merely note for the moment that because the fraudulent concealment doctrine as applied in this Circuit includes both categories, *see, e.g., Kennedy*, 814 F.2d at 802, and the fact that there is nothing in the language of Section 1113 to suggest otherwise, we are inclined to think that the scope of Section 1113's incorporation of the fraudulent concealment doctrine includes both. *See Martin*, 966 F.2d at 1094-95.

Circuit noted in *Martin*, Congress knew how to require "actual knowledge," and did so for the three-year limitations period under Section 1113(2). Holding that the fraud or concealment exception extends the limitations period to six years from the date of actual discovery would conflict with the fact that the preceding three year period runs from the date of "actual knowledge." In addition, incorporating the notion of constructive discovery comports with the general requirement under the fraudulent concealment doctrine that there be a showing of reasonable diligence before tolling is allowed.[10] *Martin*, 966 F.2d at 1096; *Maggio*, 824 F.2d at 127-28; *Kennedy*, 814 F.2d at 802; *Cook*, 573 F.2d at 695.

We turn, lastly, to the appropriate standard to be applied when determining the "date of discovery." As we emphasized in *Maggio*, whether a plaintiff should have discovered the alleged fraud "is an objective question" requiring the court to "determine if the plaintiff possessed such knowledge as would alert a reasonable investor to the possibility of fraud." *Maggio*, 824 F.2d at 128 (citing *Cook*, 573 F.2d at 697). We are unpersuaded by Appellants' insistence that by adopting such an objective standard we will undercut ERISA's goals regarding the protection of pension benefits. First, Appellants' argument seems to ignore the plain language of Section 1113 explicitly calling for a "discovery" standard, which has been interpreted to employ a "known or should have known" standard. *See United States* v. *James Daniel Good Property*, 971 F.2d 1376, 1381 (9th Cir. 1992).

Second, while this inquiry is an "objective" question, the determination of whether a plaintiff actually exercised reasonable diligence is a more subjective one. In making that assessment, we "focus[] upon the circumstances of a particular case, including the existence of a fiduciary relationship, the nature of the fraud alleged, the opportunity to discover the fraud, and the subsequent actions of the defendants. *Maggio*,

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[10] There is authority that reasonable diligence is not required in cases of active concealment. *See, e.g., Martin*, 966 F.2d at 1096 nn.19, 20, 1098; *Lewis* v. *Herrmann*, 755 F. Supp. 1137, 1148 (N.D. Ill. 1991).

824 F.2d at 128; *Kennedy*, 814 F.2d at 803 (stating that "the exercise of reasonable diligence is determined 'by examining the nature of the misleading statements alleged, the opportunity to discover the misleading statements, and the subsequent actions of the parties' ") (quoting *Cook*, 573 F.2d at 696). We believe that because we engage in a "subjective" inquiry when assessing the exercise of reasonable diligence, ERISA's goals will not be undercut by applying an objective standard when determining the "date of discovery." Whatever apparent harshness that may result from application of the objective standard will be mitigated by our consideration of those more subjective factors.

We also remind Appellants that "[a]lthough any statute of limitations is necessarily arbitrary, the length of the period reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975). Section 1113 explicitly time bars actions against fiduciaries which are not commenced within six years of either the date of the last transaction or, in the case of fraud or concealment, the date of discovery. 29 U.S.C. § 1113. In this regard, we note that Section 1113 states "after the earlier of," not "after the later of," which makes it a more stringent statute of limitations than, for example, ERISA's Section 1451(f).[11] The protections Congress established under ERISA

[11] Section 1451(f) provides that, "An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

29 U.S.C. § 1451(f) (1994). In interpreting this statute, courts have acknowledged that § 1451(f)(2), but not § 1451(f)(1), incorporates a discovery rule. *See Larson*, 21 F.3d at 427.

are clearly available to plaintiffs who do not let their rights pass them by. Finally, we note further that none of the other circuit courts which have interpreted Section 1113 have adopted a subjective standard despite the fact that those cases, as here, involved alleged breaches of fiduciary duty.[12]

In summary then, we hold that the fraud or concealment tolling provision of Section 1113 incorporates the fraudulent concealment doctrine, which operates to toll the statute of limitations "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part . . . until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" *Holmberg*, 327 U.S. at 397 (quoting *Bailey*, 88 U.S. at 348); *see Maggio*, 824 F.2d at 127. Accordingly, in order to toll the limitations period under Section 1113's fraud or concealment exception, Appellants must demonstrate that "(1) defendants engaged in a course of conduct designed to conceal evidence of their alleged wrongdoing and that (2) [the plaintiffs] were not on actual or constructive notice of that evidence, despite (3) their exercise of reasonable diligence." *Larson*, 21 F.3d at 1172 (quoting *Foltz* v. *U.S. News & World Report, Inc.*, 663 F. Supp. 1494, 1537 (D.C. Cir. 1987))[13] Furthermore, it is Appellants' burden under Federal Rule of Civil Procedure 9(b) to plead with particularity the facts giving rise to the fraudulent concealment claim. Plaintiffs' attempt to toll the statute will fail if the evidence shows that they were on discovery notice of the alleged violations of fiduciary duty more than six years before the

[12] While the parties did not cite to any legislative history, we have not found much that is particularly helpful regarding Congress intent with respect to Section 1113. *Accord, Larson*, 21 F.3d at 1171; *Radiology Center*, 919 F.2d at 1221.

[13] We adopt the formulation most recently reiterated by a member of this Court in *Larson*, which sets forth a clear test and does not differ in substance from our usual description of the fraudulent concealment doctrine. *See, e.g., Maggio*, 824 F.2d at 127 (setting forth *Bailey* standard).

filing date. *See Truck Drivers & Helpers Union, Local No. 170* v. *NLRB*, 993 F.2d 990, 998 (1st Cir. 1993) (noting that the burden of showing reasonable diligence normally falls on the party seeking to toll the statute of limitations by alleging affirmative acts of concealment under the doctrine of fraudulent concealment). This Circuit has characterized the facts that trigger discovery or constructive notice as "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved." *Cook*, 573 F.2d at 697. While discovery does not require that plaintiffs become fully aware of the nature and extent of the fraud, it is these "storm warnings" of the possibility of fraud that trigger their duty to investigate in a reasonably diligent manner, and their cause of action is deemed to accrue on the date when they should have discovered the alleged fraud. *Maggio*, 824 F.2d at 128.

B. *Application of the Fraud or Concealment Exception*

Having set forth the applicable standard and relevant considerations, we turn to the application of Section 1113's fraud or concealment exception. In their complaint, Appellants allege that Appellees engaged in a fraudulent trading scheme comprising purchases of unsuitably high risk limited partnerships, account churning, and commission overcharges. Appellants contend that Appellees, in furtherance of their scheme, made material oral and written misrepresentations regarding the value and safety of the investments, the amount of profit generated by the trades, and the amounts of commissions charged.

For purposes of disposing of this appeal, we need not make

any specific findings regarding the issue of whether Appellees committed or concealed the alleged fraud. Nevertheless, we review the record in the light most favorable to Appellants, the non-moving party, as we determine whether the district court erred when it granted summary judgment based on its conclusion that Appellants had not offered evidence from which a reasonable juror could conclude that Appellants would not have known, in the exercise of reasonable diligence, about Appellee's alleged violations six years or more before August 20, 1993, *i.e.*, on or before August 20, 1987. We discuss the transactions in turn.

1. *The Limited Partnerships*

A. *The Alleged Misrepresentations and the Prospectuses*

With respect to the three limited partnerships purchased in June 1985, September 1985, and June 1987 respectively, Appellants allege that Appellees violated their fiduciary duty by orally misrepresenting the risks and the suitability of the these investments. They contend that the names[14] of the limited partnership interests were deceptive because they suggest safe and suitable pension investments. They also maintain that the portfolio reviews substantiated Hegenbart's misrepresentations so that Appellants were induced to retain the interests. Even assuming that the titles were "deceptive" and that the reviews were misleading, the record shows that Appellants received prospectuses on or about the date each of these interests were purchased. The prospectuses fully disclosed the suitability requirements and risk factors and, when read with reasonable diligence, plainly contradict the alleged oral misrepresentations that these were low risk investments.

[14] The names were "Balcor Pension Investors VI," "Commercial Development Fund 85" and "Federal Insured Mortgage Investors II."

Appellants have not alleged that any of the risk disclosures contained in the prospectuses are fraudulent. Even viewing the facts in the light most favorable to the Appellants, we find that these disclosures provided them with sufficient storm warnings of the alleged misrepresentations and the possibility of fraud. *Maggio*, 824 F.2d at 129 (holding that financial data that contradicted what plaintiffs were led to believe provided sufficient storm warnings); *Kennedy*, 814 F.2d at 801 (holding that discrepancy between oral misrepresentations and an offering memorandum constituted inquiry notice commencing limitations period). Thus, we conclude that receipt of the prospectuses put Appellants on discovery notice of the alleged misrepresentations regarding the suitability and riskiness of the partnerships at or around June of 1985, September of 1985 and June of 1987.

Appellants insist, however, that there are "numerous disputed issues of material fact" regarding the limited partnerships which were relevant on summary judgment. We find only one relevant — Appellants' contention that there is a factual dispute as to whether they ever received the prospectuses. Appellants bolster their position by pointing to the fact that Appellees produced a subscription agreement, which indicates receipt of a prospectus, for only one of the three limited partnerships — the first one, purchased in June of 1985. They also rely on the affidavits submitted by Justman and Bladd which deny the genuineness of their signatures on the subscription agreement. Finally, they base the existence of a disputed material fact on Bladd's third affidavit, in which for the first time Bladd suggests that Appellees did not tell him

> to read any prospecti relating to the partnerships. In fact, I am certain that I never received a prospectus from Hegenbart *before* purchasing a limited partnership on behalf of the Plan.

Record Appendix, p. 145 (emphasis in original). Bladd also states that he has "no recollection" of ever receiving a

prospectus and that his files do not contain copies of any prospectuses.

As the district court found, Appellants' evidence is insufficient to create a disputed issue of fact with respect to whether they received the prospectuses. First, we note that Bladd's third affidavit, dated February 15, 1995, is the first instance in which Appellants dispute the argument that they were on notice by receipt of the prospectuses. What is striking about this is how late in the proceedings this occurred — more than one year after Appellees first raised the argument in their November 30, 1994 memorandum in support of their motion for summary judgment. Appellants did not dispute Appellees' contention that they received prospectuses in either their initial or supplemental filings in opposition to Appellees' motion for summary judgment, nor in Bladd's first affidavit. The first "contradiction" appears in Appellants supplemental memorandum, dated February 9, 1995, where the affidavits filed by Justman and Bladd merely state that the signatures on the subscription agreement are not their own. Guided by the principle that when reviewing motions for summary judgment, courts should "pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required," *Rivera-Cotto* v. *Rivera*, 38 F.3d 611, 613 (1st Cir. 1994) (quoting *Wynne* v. *Tufts Univ. Sch. of Medicine*, 976 F.2d 791, 794 (1st Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1845 (1993)), we view with significant skepticism what appears to be a last ditch effort to create a disputed fact where none exists.

Second, and more importantly, Bladd's statements on the issue of whether the prospectuses were received are merely conjectural and, thus, not sufficient to sustain a finding that a disputed issue exists. *See Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) ("[T]he evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve."). Not only does Bladd's third affidavit fail to state

that the prospectuses were never provided or received, his lack of recollection is insufficient to rebut Appellees' affidavit and the acknowledgment of receipt evidenced by the subscription agreement. As the district court found, we face Appellants' conjecture versus Appellees' direct statement of fact. On this alone, the weight of the evidence tips the scale in favor of Appellees; and, when considered together with Bladd's statement that he did not find any prospectuses after "he searched [his] files carefully," the scale tips further in their direction. Bladd's statement simply does not satisfy Appellants' burden of producing evidence that they did not receive the prospectuses. Absent any evidence that Bladd had either a set procedure for filing documents or that he would file prospectuses if received, their mere absence from his files does not provide a factfinder with any reasoned basis to believe either that because Bladd's files did not yield the prospectuses he did not receive them or that his files would have contained the prospectuses had they been received. Finally, as the district court also noted, Bladd's affidavit only indicates that he is certain that he did not receive any prospectuses *before* the transactions. It does not contain any probative evidence to dispute the fact that Appellants received prospectuses some time on or around the purchase dates.

Thus, we conclude that because Appellants' evidence lacks "substance in the sense that it [does] not limn[ ] differing versions of the truth which a factfinder must resolve," *id.*, the only reasonable inference a factfinder could reasonably draw is that Bladd received the prospectuses for the limited partnerships on or around the time when the transactions were made. This, coupled with the sufficient storm warnings that the prospectuses revealed, leads us to the conclusion that no reasonable basis exists for a reasonable factfinder to find that Appellants were not on discovery notice of the alleged misrepresentations regarding the limited partnerships.

B. *The Alleged Concealment and the Monthly Statements*

Appellants also allege that Appellees concealed the partnerships' market value by listing them at their purchase price, rather than at their market value, in the monthly statements. The district court found that the monthly statements Appellants received did not conceal the market value of the limited partnerships, because they listed the "face amount" and included a statement that "the face amount does not necessarily reflect the current market value." The district court concluded that based on these undisputed facts Appellees did not conceal the market value of these investments. We agree. Beginning in January of 1986, Appellants were presented every month with a reminder that the face amount did not reflect the market value. A simple phone call inquiring about the market value would have exposed the value and shed light on the wisdom of these transactions. *Cook*, 573 F.2d at 696-98 (finding that plaintiffs were on inquiry notice by receipt of ominous financial reports contradicting oral assurances); *Carluzzi* v. *Prudential Securities, Inc.*, 824 F. Supp. 1206, 1211-13 (N.D. Ill. 1993) (finding that legend on monthly statements which disclosed that face value did not equal market value was sufficient to put investors on notice); *Holtzman* v. *Proctor, Cook & Co.*, 528 F. Supp. 9, 14 (D. Mass. 1981) (finding that confirmation slips and monthly statements should have alerted reasonable persons to the possibility of account mismanagement). Thus, even assuming that Appellees "concealed" the value of the limited partnership interests, Appellants were on discovery notice of the alleged concealment as early as January 1986. *Cook*, 573 F.2d at 695 (holding that even where facts are fraudulently withheld a plaintiff cannot be allowed to ignore the economic status of his or her investment).

2. *The Bond Swap*

Appellants allege that Appellees misrepresented the value of the 1986 bond swap transaction and that, contrary to the

district court's finding, "a simple reading" of the May 1986, statement would not have alerted unsophisticated investors to the possibly fraudulent nature of the transaction. We disagree. It is undisputed that Appellants were provided with monthly statements, which disclosed the transactions Appellants had authorized Hegenbart to make. Simple arithmetic — straightforward addition and subtraction — reveals a discrepancy of more than $68,000 between the debit attributable to the purchase of the new bonds and their market value. This alone should have alerted Appellants to the possibility that fraudulent statements may have been made in connection with the bonds' value. Thus, while Appellants maintain that they only became aware of the losses resulting from the bond swap in January of 1994, we find that they received sufficient storm warnings in May of 1986.

3. *The Commissions*

Appellants also allege that Hegenbart misrepresented that Shearson's commission charges would be below the market rate and that they were overcharged commissions with respect to the bond swap transaction. They contend that "the first notice that [they] received of any possible wrongdoing regarding [the] commissions" was during the summer of 1992, when Bladd was informed that there may have been commission overcharges. We are unpersuaded. As with the bond swap, the May 1986 statement provided Appellants with sufficient storm warnings about the possibility of excessive commissions. As the district court found, the discrepancy between the debit and sale prices for the bonds should have alerted Appellants to the possibility of excessive commissions and prior misrepresentations regarding the rate actually charged. These storm warnings were reinforced by the thunderous sirens contained in Ben-Meir's October 17, 1988 letter "urg[ing] . . ., *once again*, to request and obtain an accounting of the fees and commissions" (emphasis added). Contrary to Appellants' contention, the fact that Appellees have not contested the allegation of commission overcharging

is irrelevant for purposes of determining whether Appellant's claim is barred by the statute of limitations. Nor is it relevant that the monthly statement *could* have broken out the amount of commissions charged, although such a practice would certainly have been more helpful to Appellants. What is relevant, and controlling for purposes of this appeal, is the date of discovery. Here, that date is May 1986, which is more than six years before the commencement of this action in August 1993.

4. *Reasonable Diligence*

The storm warnings triggered Appellants' duty to exercise reasonable diligence. *Kennedy*, 814 F.2d at 802; *Cook*, 573 F.2d at 696. Appellants contend, however, that the district court erred when it required them to show reasonable diligence. First, Appellants assert that because the alleged violations involved active concealment, as opposed to self-concealing wrongs, there is no requirement that Appellants show reasonable diligence. *See, e.g.*, *Martin*, 966 F.2d at 1096 nn. 19, 20 (noting that courts are divided as to whether the plaintiff must show due diligence in cases of active concealment); *Lewis* v. *Herrmann*, 775 F. Supp. 1137, 1148 (N.D. Ill. 1991) (noting that a plaintiff's due diligence may be excused when a fiduciary with a duty to disclose engages in active concealment). In this Circuit, however, we have held that "[i]rrespective of the extent of the effort to conceal, the fraudulent concealment doctrine will not save a charging party who fails to exercise due diligence, and is thus charged with notice of a potential claim." *Truck Drivers & Helers Union*, 993 F.3d at 998. As we noted earlier, when the party seeking to toll the statute by fraudulent concealment alleges affirmative acts of concealment, the burden of showing reasonable diligence falls on that party. *Id.* Thus, in this Circuit, by alleging affirmative acts of fraudulent concealment Appellants are required to show due diligence. To cover all of the bases, we note that we place the burden of showing reasonable diligence on the defendant when the plaintiff alleges that the statute is tolled by a self-concealing wrong,

id., such that defendants "'have the burden of coming forward with any facts showing that the plaintiff could have discovered . . . the cause of action if he had exercised due diligence.'" *Id.* (quoting *Hobson* v. *Wilson*, 737 F.2d 1, 35, (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985)). Even placing this burden on Appellees, Appellants' complaint will nonetheless be defeated. Appellants were provided with sufficient information which reveals, or at a minimum suggests, the possibility of the alleged violations.

In the alternative, Appellants argue that, even if some standard of reasonable diligence were applied, a district court must take into account the traditional factors used in assessing reasonable diligence before summary judgment is granted. *Maggio*, 824 F.2d at 128; *Cook*, 573 F.2d at 697. While we agree that the traditional and "more subjective" factors are to be considered, we disagree that they should affect the outcome of this appeal. Stressing the subjective nature of the "reasonable diligence" test, Appellants essentially argue that they acted in a reasonably diligent manner in light of their unsophistication as investors and their reliance on Appellees as their fiduciaries.

We remind Appellants that, although subjective factors are taken into account, "the exercise of reasonable diligence requires an investor to be reasonably cognizant of financial developments relating to [their] investment, and mandates that early steps be taken to appraise those facts which come to the investors attention." *Cook*, 573 F.2d at 698. Even assuming that Appellees owed Appellants a fiduciary duty, an investor "must 'apply his common sense to the facts that are given to him [or her]' in determining whether further investigation is needed." *Id.* (quoting *Cook*, 573 F.2d at 696 n.24). While we recognize, and are genuinely troubled by, the possibility that the Participants were such unsophisticated investors that they were not in a position to heed the storm warnings, the stark fact remains that "it was [their] conduct, in accepting the fraudulent misrepresentations and omissions as

true, that allowed the fraud." *Kennedy*, 814 F.2d at 803. This is what does them in.

As to the opportunity to discover the misleading nature of Hegenbart's representations and the monthly statements, it could not have presented itself more readily. The misleading information was directly refuted by the plain text of the prospectuses and simple arithmetic of the numbers on the monthly statements. Both Hegenbart's representations about the limited partnerships and the prospectuses' risk disclosures could not be true. Logically, one or the other must have been false. Similarly, while the monthly statements may have presented a misleading "big picture," comparing two numbers (albeit on two different pages) on the May 1986 statement revealed a significant discrepancy in the bond swap figures. A minimal attempt to resolve these contradictions — for example, asking Ben-Meir, Hegenbart or McHugh for an explanation or a more comprehensive accounting — should have uncovered the fraud or, at a minimum, prompted Appellants to abandon (as Ben-Meir strongly recommended in 1988) their apparent "laissez-faire" approach. *Kennedy*, 814 F.2d at 803 (noting that any attempt to resolve contradictions between oral misrepresentations and offering memorandum should have uncovered the fraud or dissuaded plaintiffs from the folly).

Nor can the subsequent actions of the parties help Appellants' case. Instead of making a minimal inquiry or otherwise attempting to resolve the contradictions, Appellants did absolutely nothing. Even assuming that Appellants did not see the first storm warnings, "there were yet more dark clouds on the horizon." *Maggio*, 824 F.2d at 128. We find that Ben-Meir's letter of October 17, 1988, and Justman's 1990-1992 arbitration proceedings (which produced documents-regarding the excessive commissions) should have brought Appellants to attention. Even commencing this action in October of 1988, Appellants still had until June of 1991 to bring suit for violations in connection with the first limited partnership interest (purchased in June of 1985) and until September of 1991 for

the second (purchased in September of 1985). Even starting after October of 1991, they still had until June of 1993 for the third limited partnership interest (purchased in June of 1987) and, until May of 1992 for the bond swap and the commissions. Appellants would not have been time-barred on any of their actions had they acted in October of 1988 upon the information before them.

In light of the foregoing, we believe that in this situation even unsophisticated investors, such as Appellants here, should have sought to learn more about the nature and content of the Plan's management. We believe that Appellants' prolonged failure to investigate the possibility of fraudulent conduct in light of the multiple storm warnings can hardly be characterized as reasonable diligence. Unsophisticated or not, plaintiffs cannot shroud themselves in ignorance or expect that their unsophistication will thoroughly excuse their lack of diligence or failure, here, to even inquire. To allow unsophisticated investors to remain utterly ignorant in the face of multiple warnings would render meaningless the due diligence requirement. Requiring due diligence encourages plaintiffs to take action to bring the alleged fraud to light, grants some sense of repose to defendants, and assures that evidence presented on the claim will be fresh. *Brumbaugh* v. *Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993) (stating that merely bringing suit after the scheme has been laid bare does not satisfy the due diligence requirement when there have been prior warnings that something was amiss).

Lastly, Appellants argue that because reasonable diligence is factually based, it should not ordinarily be decided on summary judgment. *Cook*, 573 F.2d at 697. However, "even assuming the question of reasonable diligence is ordinarily to be decided by the trier of fact, where no conflicting inferences can be drawn from the testimony an appeals court may make its own determination." *Id.; see Sleeper* v. *Kidder, Peabody & Co.*, 480 F. Supp. 1264, 1266 (D. Mass. 1979) (noting that although the issue of reasonable diligence is factually based, it may be determined as a matter of law where the underlying

facts are admitted or established without dispute), *aff'd mem.*, 627 F.2d 1088 (1st Cir. 1980). Here, the district court properly granted summary judgment because there is nothing on the record to support an inference that Appellants were reasonably diligent.

CONCLSION

For the foregoing reasons, the district court's grant of summary judgment is *affirmed*.

United States Court of Appeals
For the First Circuit

No. 95-1699

J. GEILS BAND EMPLOYEE BENEFIT PLAN, ET AL.,

PLAINTIFFS - APPELLANTS,

v.

SMITH BARNEY SHEARSON, INC., ET AL.,

DEFENDANTS - APPELLEES.

Before

TORRUELLA, *Chief Judge*,

BOWNES, *Senior Circuit Judge*,

and STAHL, *Circuit Judge*.

ORDER OF COURT

Entered March 21, 1996

Appellants seek rehearing on the grounds that "the [c]ourt based its determinations of the first two prongs of its analysis on mistaken points of fact." The errors were material, they argue, because it resulted in the erroneous determination that their action was not timely filed.

First, Appellants claim that the court erred when it found that June 1987 was the last occurrence of commission charges and, thus, is the "date when the last action which constituted the breach or violation" occurred. Appellants insist that the last commission charges occurred on December 14 or 15, 1988, and that the record supports such a finding. *See* Decision, p. 11 n.5. Second, Appellants contend that the court erred when it determined that the date on which the action was com-

menced was August 20, 1993, as opposed to May 28, 1993. *See* Decision, pp. 11-12. Appellants claim that the record clearly supports the May 28, 1993, finding.

As to the first alleged mistake, Appellants "concede that the court's mistake of fact. . . may have resulted from [their] inaccurate reference to the Appendix." They now refer us to two new references in the Appendix and submit new evidence of the commission charges. While the new Appendix references confirm (i) that they purchased $400,000 of U.S. Treasury strips on December 14, 1988, and (ii) that they were "delivered" on July 24, 1990, it does not provide evidence that any commissions, let alone excessive ones, were charged. Furthermore, although the new evidence which Appellants now submit does show that they were charged $2,500 in commissions (approximately 3.29% of the purchase price) for the December 14, 1988, purchase, this evidence was not included in the record either before us or before the district court.

While it is clear from Appellants' new evidence that the last date of commission charges was December 14 or 15, 1988, the new Appendix references — even when drawing inferences in their favor — do not provide, as we stated in footnote 5 of the Decision, "sufficient evidence [to] support[] resolution of this 'dispute' in [their] favor." We are also of the view that the new evidence, which was not part of the record, should not be permitted to be the basis for a rehearing.

As to the second alleged mistake, Appellants erroneously state that they argued on appeal that May 23, 1993, should be used as the date when the action was commenced. While they did make this argument below, they never argued on appeal that the district court erred when it found August 20, 1993, to be the relevant date. It was for this reason that the court adopted the district court's date. *See* Decision, p. 12 (stating that since "[n]either party disputes this reasoning on appeal and, because it has no bearing on the outcome, we adopt without further comment the district court's use of August 20, 1993 . . . ."). Having failed to raise on appeal the district court's use of August 20, 1993, Appellants cannot now

claim that we erred when we adopted the district court's finding.

For the foregoing reasons, Appellants' petition for rehearing is denied.

By the Court:

WILLIAM H. NG, Clerk

By: JANICE M. O'NEIL
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 94-12024-REK

J. GEILS BAND EMPLOYEE BENEFIT PLAN AND JOHN GEILS, JR., STEPHEN BLADD, RICHARD SALWITZ, AND SETH JUSTMAN,

PLAINTIFFS,

v.

SMITH BARNEY SHEARSON, MATTHEW McHUGH, AND KATHLEEN HEGENBART,

DEFENDANTS.

MEMORANDUM AND INTERLOCUTORY ORDER
MAY 9, 1995

Pending before the court are the following motions:

(1) Plaintiffs' Motion to Compel Arbitration or, in the Alternative, for an Order Staying Arbitration Pending Adjudication by Jury Trial of Non-Arbitrable Claims (Docket No. 5, filed Oct. 21, 1994);

(2) Defendants' Motion for Summary Judgment on Plaintiffs' Claim and Defendants' Counterclaim (Docket No. 10, filed Nov. 30,1994); Defendants' Memorandum in Support Thereof (Docket No. 8, filed Nov. 30, 1994); Affidavit of Defendant Hegenbart (Docket No.12, filed Nov. 30, 1994); Supplemental Affidavit of Defendant Hegenbart (Docket No. 20, filed Jan. 24, 1995); Plaintiffs' Opposition to the Defendants' Motion for Summary Judgment (Docket No. 14, filed Dec. 28, 1994); Plaintiffs' Supplemental Memorandum of Law Regarding the Statute of Limitations (Docket No. 21, filed Feb. 9, 1995); Defendants' Supplemental Memorandum in Support of Summary Judgment (Docket No. 22, filed Feb. 10, 1995); Plaintiffs' Rebuttal Memorandum (Docket No. 25, filed Feb. 16, 1995); Defendants' Response to Plaintiffs' Supplemental Memorandum (Docket No. 23, filed Feb. 17, 1995).

I.

Plaintiffs are an ERISA Plan, its trustee, and its beneficiaries. The assets of the Plan were invested in accounts at Smith Barney Shearson, Inc., one of the defendants. Defendant Hegenbart is an employee of Smith Barney Shearson and was the stock broker for the Plan. Defendant McHugh is a branch manager for Smith Barney Shearson.

Plaintiffs allege that the defendants violated their purported fiduciary duty to the Plan under ERISA by selling three limited partnership interests to the Plan (the first in June of 1985, the second in September of 1985, and the third in June of 1987) and by making a "bond swap" for the Plan in May of 1986. Plaintiffs allege that these transactions were unsuitable for the Plan and inconsistent with the Plan's investment objectives. Plaintiffs allege that defendant Hegenbart, in order to obtain higher commissions, made fraudulent statements to induce the Plan into making these transactions. Plaintiffs also allege that they were overcharged for commissions with respect to the bond swap transaction.

Plaintiffs allege that they filed a statement of claim with the National Association of Securities Dealers seeking recovery for these claims on May 28, 1993. Defendants allege that the statement of claim was filed on June 8, 1993. Plaintiff Stephen Bladd, in his capacity as trustee of the Plan, executed a submission Agreement, submitting these claims to arbitration on August 20, 1993. This civil action was filed October 7, 1994.

II.

Defendants move for summary judgment on the plaintiffs' claims in this case on three grounds:

(1) the plaintiffs have contractually agreed to arbitration with the defendants and thus this court cannot entertain this action until the arbitration is final;

(2) the alleged violations of fiduciary duty are not actionable because of the six-year ERISA statute of limitation;

(3) the defendants are not fiduciaries to the Plan under ERISA.

Summary judgment is warranted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Celotex* v. *Catrett*, 477 U.S. 317 (1986). For the following reasons, summary judgment is granted against plaintiffs' claims on the ground that the plaintiffs' claims are barred by ERISA's six-year statute of limitation.

III.

Defendants argue for summary judgment based on the fact that plaintiffs' claims in its Complaint are barred by ERISA's statute of limitation. The provision of the ERISA statute that is most favorable to the plaintiffs states that the action must be commenced within "six years after the date of the last action which constituted a part of the breach or violation . . . except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation." 29 U.S.C. § 1113.

For the purpose of determining when this action was commenced, the plaintiffs argue that the court should use the date the plaintiffs filed the Statement of Claim with NASD (which they allege was May 28, 1993), and not the date the action was filed in this court (October 7, 1994). Section 18(a) of the NASD Code of Arbitration Procedure states that "where permitted by applicable law, the time limitation which would otherwise run or accrue for the institution of legal proceedings shall be tolled where a duly executed Submission Agreement is filed by Claimants." Defendants argue that if the statute applies at all, the relevant date is August 20, 1993, the date that the signed Submission Agreement was filed.

Assuming, without deciding, that NASD Code § 18(a) tolls the statute of limitation in this case, I conclude that the date the court should use as the date the action was commenced is August 20, 1993. Using this date, which is more favorable to the plaintiffs than the date this action was filed, the defendants' purported violations still occurred more than six years earlier.

The dates the defendants' purported violations of fiduciary duty occurred were the dates the four transactions took place. The first two limited partnership interests were purchased by the Plan in June of 1985 and September of 1985 respectively. The bond swap took place in May of 1986. The purchase of the third limited partnership interest took place in June of 1987. All of these transaction dates are more than six years before August 20, 1993, the date the submission agreement was filed. Thus, the plaintiffs' claims based on these four transactions are barred by 29 § 1113, the ERISA statute of limitation, unless the plaintiff can show that this is a case of "fraud or concealment." 29 U.S.C. § 1113.

Plaintiffs argue that although the allegedly improper transactions occurred over six years ago, the ERISA statute of limitation should be tolled. The plaintiffs, however, have not made proffers of admissible evidence that would be sufficient to toll the statute of limitation for "fraud or concealment." The Court of Appeals for the Seventh Circuit has interpreted the phrase "fraud or concealment" in 29 U.S.C. § 1113 to be a codification of the common law doctrine of fraudulent concealment for tolling a statute of limitation. *See Martin* v. *Consultants & Administrators, Inc.*, 966 F.2d 1078 (7th Cir. 1992). The Court of Appeals for the D.C. Circuit interpreted 29 U.S.C. § 1113 to require that a plaintiff show that the defendant intentionally concealed evidence of wrongdoing and that the plaintiff lacked notice, despite the exercise of due diligence. *See Larson* v. *Northrop Corp.*, 21 F.3d 1164 (D.C. Cir. 1994). Even if this circuit were to hold that the ERISA statute of limitation could be tolled by showing something constituting "fraud or concealment" but less than what was necessary to prove fraudulent concealment under common law, the plaintiffs have not made such a showing. With respect to statutes of limitation for other securities-related activities, plaintiff investors have been held to be on discovery notice commence the running of the statute of limitation where they have received sufficient "storm warnings" to alert a reasonable person to undertake greater inquiry. *See*

Kennedy v. *Josepthal & Co. Inc.*, 814 F.2d 98, 802-03 (1st Cir. 1987); *Cook* v. *Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978). As explained below, the plaintiffs have not proffered evidence from which a reasonable juror could conclude that the plaintiffs, had they undertaken an inquiry, would not have known about the defendants' purported wrongdoing.

It is the plaintiffs' burden to allege facts (supported by proffers of admissible evidence) that, if proved, would constitute "fraud or concealment." Nevertheless, plaintiffs will have failed to meet this burden of production if the defendants show beyond reasonable dispute that the plaintiffs were on inquiry notice of the alleged violations of fiduciary duty more than six years before the filing date. In other words, although it may not be necessary in order for the defendants to prevail, it is sufficient for the defendants to show that the plaintiffs knew, or in the exercise of due diligence, should have known about the alleged violations of fiduciary duty six years or more before August 20, 1993; i.e., on or before August 20, 1987.

I discuss each transaction in turn.

With respect to the 1986 bond swap transaction, it is undisputed that the plaintiffs were provided monthly statements for their investment account. These statements disclosed transactions that the Plan had authorized defendant Hegenbart to make during each month. The monthly statements show the amounts for which assets were bought and sold.

In particular, the monthly statement for May of 1986 shows the amounts for which the "old" bonds were sold and the amounts for which "new" bonds were purchased. The plaintiffs allege that the defendants fraudulently concealed the amount of commissions they received upon execution of the bond-swap transaction. Yet, the May 1986 statement listed the market value of the bonds at $558,000, an amount significantly less than the amount for which they were purchased only a few days earlier. The difference between the debit attributable to the purchase of the bonds and the market value of the bonds is $68,436.00. The amount of the commissions

the defendants received is $61,061.00. Although the $68,436.00 sum is not a measure of commissions only, the plaintiffs, if they had read the monthly statement, would have been alerted to the general magnitude of the commissions received by the defendants. Moreover, they would have been alerted to the possibility that fraudulent statements may have been made by defendant Hegenbart about the value of the bonds. Thus, the May 1986 statement provides enough information about the bond-swap transaction to put the plaintiffs on inquiry notice of the purported fraudulent nature of this transaction.

With respect to the three limited partnership purchases occuring in June of 1985, September of 1985, and June of 1987 respectively, the plaintiffs allege that the defendants violated their fiduciary duty to the Plan by mispresenting the riskiness and the suitability of these investments. Plaintiffs further allege that the defendants concealed the true value of these investments by listing them at their purchase price in the monthly statements. Unlike the bonds purchased in the bond-swap transaction, the limited partnership investments are not publicly traded, and thus the monthly statements did not list the market value of these holdings. The monthly statements listed the "face amount" of the limited partnership interests and included the statement that "[T]he face amount does not necessarily reflect current market value." Thus, based on these undisputed facts, the defendants did not conceal the market value of these holdings.

In response to the plaintiffs' allegations that the defendants orally misrepresented the suitability and riskiness of these limited partnerships, the defendants argue that it is undisputed that plaintiffs were given prospectuses in 1985 and 1987 on or around the time the Plan purchased the limited partnership interests. Each prospectus describes the risk associated with each limited partnership. Thus, defendants argue, the plaintiffs were on inquiry notice of the riskiness and suitability of the limited partnership investments.

The plaintiffs' complaint and original claim was not based

on the contention that they did not receive prospectuses. Yet, in response to the motion for summary judgment, the plaintiffs have attempted to create a disputed issue of fact by implying in their Supplemental Memorandum of Law (Docket No. 21, filed Feb. 9, 1994) that the trustee of the Plan, and the other plaintiffs, did *not* receive the prospectuses for the limited partnership investments. The plaintiffs imply this by alleging that the signature of Stephen Bladd on a subscription agreement is not genuine. In a later memorandum, entitled plaintiffs' rebuttal memorandum (Docket No. 25, filed Feb. 16, 1995) they further insinuate that they did not receive prospectuses by arguing that "the Plaintiffs have no memory of ever signing a subscription agreement, and are certain that they never received a prospectus prior to the purchase of a limited partnership." Plaintiffs' Rebuttal Memorandum at 2.

Despite the plaintiffs' contentions, the defendants will prevail if this court determines that the only inference a factfinder could reasonably draw on the record before this court is that Stephen Bladd, the trustee of the Plan, received the prospectuses for the three limited partnerships on or around the time the transactions were made. It is not enough to allege simply that a fact is in dispute or to offer merely colorable evidence. In this circuit,

> The test for summary judgment is steeped in reality. Although the remedy must be withheld if material facts are authentically disputed, there is a burden of production: the party opposing the motion must set forth specific facts showing that there is a genuine issue for trial. . . . [T]he evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.

Medina-Munoz v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) (quotations and citations omitted).

In this case, the plaintiffs have not met their burden of production to show that there is a genuine issue for trial. Plaintiff Bladd's affidavit states that "I have no recollection of receiving any prospecti for the limited partnerships purchased by the Plan. I have searched my files carefully and have found no prospecti for any of the partnerships purchased by the Plan." Bladd's affidavit also states that "[i]n fact, I am certain that I never received a prospectus from Hegenbart *before* purchasing a limited partnership on behalf of the Plan." *See* Third Affidavit of Stephen Bladd at 1 (Exhibit A to Docket No. 25, filed Feb. 16, 1995) (emphasis in original). Defendants position, supported by the Hegenbart affidavit, is that the plaintiffs were given prospectuses on or around the time of their transactions. *See* Hegenbart Affidavit (Docket No. 12, filed Nov. 30, 1994).

Although Bladd's affidavit attempts to create a disputed issue of fact as to whether he received prospectuses, it is merely conjectural. The first statement that Bladd "has no recollection of receiving any prospect[uses]" supports the inference that he *did* receive prospectuses as readily as it supports the inference that he did not. The statement that he "searched [his] files carefully" and did not find any prospectuses does not satisfy the plaintiffs' burden of producing admissible evidence that the plaintiffs did not receive them. Bladd's affidavit does not establish that Bladd had a set procedure for keeping documents related to the Plan. The factfinder would have no reasoned basis to believe that Bladd's files would have contained the prospectuses if he had received them.

Plaintiff Bladd's third statement, that he is certain that he did not receive prospectuses *before* the transactions, is clearly an attempt to evade the issue. Plaintiff Bladd's affidavit reveals no significantly probative evidence to dispute the fact that plaintiffs received prospectuses some time soon *after* the transactions. Although it is not necessary to the decision of this motion, I note that for many securities transactions conducted through a broker, the securities laws require only that

a prospectus be delivered to the customer after the securities are purchased. *See* 15 U.S.C. §§ 77b(10) & e(b)(1) (detailing the prospectus delivery requirement). In any case, the plaintiffs have not met their burden of production to create a genuine dispute based on the admissible evidence as to whether the plaintiffs did, in fact, receive prospectuses around the time of the transactions. Thus, no reasonable factfinder could find on a reasoned basis that the plaintiffs were not on inquiry notice of the alleged misrepresentations with respect to the limited partnerships.

The defendants' motion for summary judgment with respect to the plaintiffs' claims is allowed.

IV.

Defendants have filed a counterclaim requesting this court to enter a declaratory judgment stating that this court cannot hear claims that the plaintiff has contractually agreed to arbitrate, but that are ineligible for arbitration because of the six-year statute of limitation applicable to NASD arbitration proceedings. In other words, the defendants request a ruling that this court may hear claims that would not be barred by the statute of limitation applicable in this court, but that are barred by the statute of limitation applicable to NASD arbitration proceedings. The defendants have moved for summary judgment on their counterclaim.

In light of the court's determination, upon summary judgment motion, that the plaintiffs' claims are barred by the ERISA statute of limitation applicable in this court, the defendants counterclaim is not ripe for consideration. None of the parties has shown the existence of any claims that would be the subject of the declaratory judgment requested by the defendants. This court does not make advisory rulings. Thus, the defendants' motion for summary judgment as to their counterclaim is dismissed as moot.

INTERLOCUTORY ORDER

For the foregoing reasons, it is ORDERED:

(1) Defendants' Motion for Summary Judgment (Docket No. 10) is allowed with respect to the plaintiffs' claim and dismissed as moot with respect to the defendants' counterclaim;

(2) Plaintiffs' Motion to Compel Arbitration or in the Alternative, for an Order Staying Arbitration Pending Adjudication by Jury Trial of Non-Arbitrable Claims (Docket No.5) is dismissed as moot;

(3) A scheduling conference is set for 3:30pm., Monday, June 19, 1995, to consider whether a Final Judgment should be entered and, if not, to schedule further proceedings essential to prompt final disposition of this case. If the parties sign and file, on or before that date and in accordance with Fed. R. Civ. P. 41(a), a stipulation of dismissal of the defendants' counterclaim and any other remaining claims, Final Judgment will be entered accordingly.

s/ROBERT E. KEETON
United States District Judge